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Nos. 86-1068 and 86-1081

In The

Supreme Court of the United States

October Term, 1986

LAWRENCE DUNCAN AND
MARGARET DUNCAN,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG AND
DAVID WAYNE VAN NICE,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

CONSOLIDATED BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record
For Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1.

Whether Petitioners have failed to present the standing question in the federal statutory context under 18 U.S.C. § 2518 to the Court of Appeals of Georgia for its review.

2.

Whether the Court of Appeals of the State of Georgia properly concluded that Petitioners lacked standing to challenge the validity of the wiretap warrant as the alleged illegality related to an entity not a party to the instant proceedings.

3.

Whether there was no due process violation sufficient to justify the exclusion of any evidence in the instant action.

4.

Whether the Court of Appeals of Georgia properly concluded that there was no violation of either the federal or state wiretap laws by the making of a duplicate tape at the time of the wiretap when the reel-to-reel original tapes were kept and returned to the court under proper procedures.

5.

Whether the Court of Appeals of Georgia properly concluded that all requirements of the state and federal wiretap statutes were complied with in relation to obtaining the warrant for the wiretap.

6.

Whether the state court properly concluded that the searches of the two automobiles in question were supported by probable cause.

7.

Whether the Court of Appeals of Georgia properly declined to find any constitutional violation based upon the arrest and search of Petitioner Long.

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PART ONE

STATEMENT OF THE CASE

On March 10, 1983, an investigation warrant was issued for electronic surveillance to be conducted on a telephone at the residence of Lawrence Duncan in Dade County, Georgia. Said telephone was listed in the name of Margaret Duncan. Based on information obtained during

the electronic surveillance, physical surveillance began of the various Petitioners on Friday, March 25, 1983. Said surveillance began in Dade County, Georgia and continued to Savannah, Georgia on a Lincoln automobile. That automobile subsequently rendezvoused with a Cadillac in Savannah. The surveillance continued until the detention of both vehicles in a parking lot in Savannah on March 27, 1983. At that time all Petitioners in the instant action were arrested. Search warrants were obtained for both vehicles and for a house which had been frequented by some of the occupants of the vehicles during the previous few days.

Petitioners were subsequently indicted in the Superior Court of Chatham County on various charges relating to violations of the Georgia Controlled Substances Act. Motions to suppress were filed on behalf of the Petitioners challenging both the wiretap and the search of the automobiles. On September 13, 1985, the trial court denied the motions to suppress.

The Petitioners then filed an appeal from the denial of the motions to suppress in the Court of Appeals of Georgia. In a consolidated opinion from the interlocutory appeal, the Court of Appeals of Georgia affirmed the trial court's denial of the motions to suppress. *Van Nice v. State*, 180 Ga. App. 112, 348 S.E.2d 515 (1986). The Supreme Court of Georgia subsequently denied petitions for writs of certiorari on October 9, 1986. The instant petitions have been filed challenging the decision by the Court of Appeals of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS FAILED TO TIMELY RAISE AN ASSERTION THAT THEY HAD STANDING UNDER 18 U.S.C. § 2518 TO CHALLENGE THE ALLEGED ILLEGALITY OF THE SUBPOENAS.

Petitioners' initial argument relates to an allegation that alleged illegal subpoenas were issued for the production of certain telephone toll records. Petitioners also assert that these telephone toll records served as a basis for the subsequent affidavit and application for the wiretap. Thus, Petitioners assert that the wiretap was illegal.

In the original briefs filed in the Court of Appeals of Georgia, the Petitioners raised this allegation under the Fourth Amendment to the United States Constitution and asserted this allegation under the Georgia wiretap statute. *See* O.C.G.A. § 16-11-67. Petitioners did not mention the federal wiretap statute in relation to this allegation. The Court of Appeals of Georgia resolved the issues based solely upon the Fourth Amendment to the United States Constitution and O.C.G.A. § 17-5-30 and O.C.G.A. § 16-11-67. The court did not refer to the federal wiretap statute in its decision on standing. Petitioners did not raise this statutory concept until after the Court of Appeals of Georgia had rendered its original opinion.

This Court has long recognized that a proper and timely presentation of a federal question in the state court is a jurisdictional prerequisite to review by this Court. *Beck v. Washington*, 369 U.S. 541, 550-4 (1962). Raising

an issue for the first time in a petition for rehearing in the state court is generally insufficient unless the state court actually entertained the petition and decided the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 102 (1945); *Herndon v. Georgia*, 295 U.S. 441 (1935). As Petitioners failed to present the federal statutory question to the state court in a timely fashion, certiorari should be denied on this basis. *See also Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. ALL PETITIONERS LACK STANDING TO CHALLENGE THE VALIDITY OF THE SUBPOENAS FOR THE TELEPHONE TOLL RECORDS.

The Court of Appeals of Georgia properly concluded that the Petitioners lacked standing to challenge the validity of the subpoenas for the telephone toll records. Petitioners have asserted that the subpoenas were invalid as there was no proceeding pending in any court at the time of the issuance of the subpoenas. Respondent asserts that the Court of Appeals of Georgia properly declined to confer standing upon any of the Petitioners.

In *United States v. Miller*, 425 U.S. 435 (1976), this Court recognized that there was no protectable Fourth Amendment interest in certain bank records which had been subpoenaed. In that case, the grand jury subpoenas were issued in blank by the clerk requiring an appearance and a production of the records on a date certain. The bank records were obtained and subsequently used in the investigation. This Court held that there was no intrusion into any area in which the defendant had a protected Fourth Amendment interest and concluded that there was

no legitimate expectation of privacy in the contents of those documents. *Id.* at 440. The Court also noted that a subpoena was not subject to the same strict requirements as search warrants. *Id.* at 440 n.8. Furthermore, in a footnote, the Court noted that the banks did not contest the validity of the subpoenas, implying that only the banks would have standing to challenge the subpoenas. *Id.* at n.9.

In the instant case, Petitioners are challenging the seizure of certain telephone toll records for the telephone in the name of Margaret Duncan. These records belong to the telephone company and are not individual records of any of the Petitioners. In relation to Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia properly concluded that these Petitioners were not aggrieved by the wiretap itself, noting that to be aggrieved "the violation must have occurred on the movants' premises or the unlawfully heard conversation must have been of the movants themselves in order to suppress the evidence." *Van Nice v. State, supra.* As noted by the court, neither was the case as it applied to Petitioners Long, Delvin and David Van Nice. Thus, clearly none of these Petitioners have standing to challenge the wiretap itself, much less the subpoenas from the toll records.

The Court of Appeals of Georgia noted properly that the Duncans would have general standing to attack the legality of the wiretap as it was on their telephone, but properly concluded that the Duncans lacked standing to assert that any illegality in the wiretap was due to the manner in which the telephone toll records were obtained. That court properly concluded that the telephone toll rec-

ords were not owned by the individual Petitioners and that there was no privacy right violated by the obtaining of these records. Thus, the court properly concluded that there was no standing under the federal constitution to challenge the procedure by which these telephone toll records were obtained. Respondent submits that this is a correct holding under the principles of *United States v. Miller, supra.*

The court also concluded that Petitioners Duncan did not have a basis for a claim under O.C.G.A. § 17-5-30 as they were not "aggrieved" by the seizure of the toll records and the records belonged to the telephone company. Respondent submits that the Court of Appeals of Georgia correctly applied the principles of law set forth by this Court in determining that Petitioners Duncan lacked standing in regard to the Fourth Amendment issue.

Finally, even though the issue was not timely raised, Respondent also asserts that Petitioners lack standing to challenge the validity of the subpoena even under the federal wiretap statute. Petitioners were not aggrieved by the subpoenas and the records obtained did not belong to the Petitioners but belonged to the telephone company. The only person actually having the authority to challenge the validity of the subpoenas would be the telephone company itself. In fact, certain similar information was also obtained through a pen register device and the information in question could also have been obtained through a pen register device. Thus, Respondent asserts that this allegation simply fails to state a constitutional question for review by this Court.

III. PETITIONERS HAVE ESTABLISHED NO DUE PROCESS VIOLATION BY THE UTILIZATION OF THE SUBPOENAS IN QUESTION.

Petitioners next assert that the alleged illegal subpoenas constituted a sufficient violation of the due process clause to require the granting of relief. Respondent submits that Petitioner has failed to show any government action which would justify the finding of a due process violation.

In *United States v. Payner*, 447 U.S. 727 (1980), this Court noted that a petitioner's Fourth Amendment rights were violated only when the challenged conduct invaded his own legitimate expectation of privacy rather than that of a third party. Thus, the Court found a lack of standing under the facts of that case. The Court also cited to *United States v. Miller*, noting that the depositor in *Miller* had no expectation of privacy in copies of checks and deposit slips on record with the bank. In *United States v. Payner*, the Court did not condone the conduct, but noted that even the conduct in that case did not command exclusion in every case of probative but tainted evidence. The Court emphasized the costly toll on the ability of the courts to ascertain the truth in criminal cases. The Court further noted in a footnote, that the same reasoning would apply to a due process claim and that such would arise only when there was some violation of a protected right of a particular defendant in question.

Respondent submits that there was no due process violation shown in the instant case as Petitioners have failed to show that any subpoenas violated any of their

protected constitutional rights. Further, Petitioners have failed to show that there was any action which was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 432 (1974). Thus this allegation fails to state a constitutional issue for review by this Court.

IV. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND NO VIOLATION OF EITHER THE STATE OF THE FEDERAL WIRETAP STATUTE BY THE UTILIZATION OF DUPLICATE CASSETTE TAPES.

Petitioners have asserted that 18 U.S.C. § 2518(8)(a) was violated by law enforcement officers making duplicate tapes from the original wiretap. Respondent submits that the Court of Appeals of Georgia properly found no constitutional violation in this regard.

The tapes in question were cassette tapes which were made at the same time that the original reel-to-reel tapes were made during the wiretap monitoring. The cassette recorder was activated manually and substantive conversations were taped to allow the officers to have a work tape with which to supplement their logs without having to utilize the original tapes. There is no question that the original reel-to-reel tapes were protected and preserved as required under the state and federal wiretap statutes.

The Court of Appeals of Georgia correctly concluded that the federal wiretap statute anticipates the making of such partial or duplicate tapes and does not require judicial approval for such duplication. In fact, 18 U.S.C. § 2518

(8)(a) states in part, "duplicate records may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations." Similarly, Georgia law also does not prohibit the making of duplicate records. As noted by the Court of Appeals of Georgia the original tapes were kept and returned to the court and they were properly preserved. The cassette tapes were utilized in maintaining the surveillance log and in taking notes. The tapes were secured by the G.B.I. agent, who also had the cassette tapes in his possession at the time of the hearing on the motions to suppress. No showing has been made of any taint to either the cassette tapes or the originals nor has there been any showing of any improper publication of any of the tapes. Thus, Respondent submits that there has been no violation of the federal wiretape statute.

V. PETITIONERS HAVE SHOWN NO VIOLATION OF THE FEDERAL WIRETAP STATUTE IN THE OBTAINING OF THE WARRANT FOR THE WIRETAP WHICH WOULD JUSTIFY THE SUPPRESSION OF ANY SUBSEQUENTLY OBTAINED EVIDENCE.

Petitioners assert that probable cause was not set forth on the face of the affidavit or in the application for the warrant for the wiretap. In the petitions before this Court, the Petitioners assert certain alleged inaccuracies in the original affidavit for the warrant for the wiretap as a basis for this allegation. Petitioners have also asserted that the application failed to contain any facts showing the inadequacy of alternative investigative procedures and assert that no showing was made why the authorization should not have terminated earlier. Petitioners also assert that there

were reckless or intentional assertions which were false in the affidavit and the application. Respondent asserts that Petitioners have failed to set forth a sufficient basis for a finding that the Court of Appeals of Georgia misapplied federal law.

Respondent initially submits that it is clear there was probable cause for the judge to issue the warrant for the wiretap. Furthermore, even though it later turned out that certain immaterial facts were not correct in the original affidavit, there has been no showing that there was an intentional or reckless statement of facts.

The affidavit submitted contained information showing that Lawrence Duncan and his associates had long been involved in activities relating to the distribution of narcotics. The heavy use of the telephone between Duncan and these inviduals would lead a reasonable person to believe that the telephone was being used to facilitate the distribution of narcotics. The investigation warrant was specific in that it authorized the interception of conversations related to these activities.

As to the alleged inaccuracies in the affidavit, the testimony at the motion to suppress hearing clearly substantiates the fact that the affiant, G.B.I. agent Bonnell, believed the information to be true at the time he presented the affidavit. Furthermore, the inaccuracies were not such as to conclude that probable cause has not been shown. The information showed that even though the affidavit stated that Charles Edward Fleming had been arrested in the possession of five kilograms of cocaine, Agent Bonnell subsequently learned that it was only three kilograms of cocaine. The affidavit also reflected that an agent had

purchased one pound of cocaine from Emanuel Fleming who was stated in the affidavit to be the oldest son of Charles Edward Fleming, Sr.; however, it was later learned that Fleming had a son older than Emanuel Fleming. Further, Agent Bonnell in his affidavit stated that the elder Fleming had been indicted in the above incident and testified at the hearing that he believed that that was the information relayed to him. It was later learned, however, that Mr. Fleming had not been indicted at the time of the affidavit, although he was being considered for indictment. The affidavit also stated that certain drugs were found in the residence of Connie Fleming Williams, when in fact the drugs were found outside of the dwelling but on her property.

The further alleged inaccuracy concerns a statement relayed by investigator Griffin to Agent Bonnell. Agent Bonnell in his affidavit stated that he had been advised that the information concerning the shooting of Florence Duncan came from persons directly involved with participants in the shooting; however, investigator Griffin indicated that his information came from persons directly involved in the drug deal related to the shooting, but not directly involved in the shooting itself.

Agent Bonnell specifically testified that he made no intentional misstatements and that he believed all the information that he stated in the affidavit was true at the time that he gave the information to the court. Thus, Petitioners have failed to show any intentional or reckless falsehood as Agent Bonnell fully believed all the information to be true at the time he made the affidavit and as it has also been shown that none of the inaccuracies were such as

to reflect on the materiality of the facts set forth in the affidavit. *See Franks v. Delaware,* 438 U.S. 154, 178 (1978).

The Petitioners further assert that two of the persons listed in the affidavit as persons involved with the Duncans had been dead for several years at the time of the making of the affidavit. Again, even though this subsequently turned out to be true, Agent Bonnell testified at the hearing on the motions to suppress that he did not know that to be a fact at the time of the making of the affidavit and, in fact, had no basis for such knowledge. He was presenting the trial court with as much information as he could on the background of the Duncans and reasonably relied on the information provided to him. Thus, again, there has been no showing of intentional or reckless falsehood in relation to this information.

Petitioners also assert that there was no showing as to the unavailability of alternative investigative measures. Respondent submits that the affidavit does establish that alternative investigative procedures would not be successful. Agent Bonnell in his affidavit noted the secrecy involved in the operation and the fact that the informants had not identified everyone involved. There was also information that Duncan had been arrested for a multitude of violations and was aware of the techniques used in covert investigations. The police had failed to make a case even though the operation had been in existence for a long period of time. The informants would not testify at any court proceeding due to fear of physical harm or death. Furthermore, the agent displayed photographs of the residence to the issuing judge showing the isolated nature of the locale and also showing the fence placed around the resi-

dence as well as the gate on the fence and bars placed on the windows.

The testimony presented at the motion to suppress hearing amply supported the information contained in the affidavit. It was established that the location in question, Sand Mountain, was a close knit community and that any attempts to make an intrusion therein would be noticed and reported to the Duncans. The officers reiterated the fact that there was no way to reasonably approach the residence without being observed and also noted the fence around the residence. Respondent submits that all of this information was clearly sufficient to show to the issuing court that other investigative procedures not only would be futile, but had been futile in the past. Thus, Petitioners have failed to show a violation of the federal wiretap statute.

Petitioners finally assert that a sufficient showing was not made to authorize a 20 day wiretap. Respondent submits that a sufficient showing was made. The affiant and the district attorney stated that time was needed to obtain information on as many participants involved in the drug organization as possible, noting that it was a continuing course of illegal conduct and that the identity of those persons providing the controlled substances and those facilitating delivery needed to be obtained. (Supplemental record 1, 15-16; 20, 25). Based upon the nature of the crimes in question and the information provided to the judge that this was an ongoing criminal enterprise, it is clear that sufficient justification was presented to allow the court to authorize a wiretap for 20 days.

Based upon all of the above, Respondent submits that Petitioners have simply failed to show any violations of 18 U.S.C. § 2518; therefore, no federal questions are presented for review of this Court. Thus, Petitioners have shown no basis for the granting of certiorari.

VI. THERE WAS SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE GRANTING OF SEARCH WARRANTS FOR THE TWO AUTOMOBILES IN QUESTION.

Petitioners have asserted that there was not sufficient probable cause to justify the search warrants for the Lincoln and Cadillac automobiles. Respondent submits that Petitioners have shown no constitutional violation in this regard.

Petitioners Duncan challenge the search of their Lincoln automobile, while Petitioners David and Delvin Van Nice and Petitioner Long challenge the search of the Cadillac automobile. Respondent asserts that probable cause was shown and the search warrants were properly issued to search both automobiles.

In relation to the search of the Cadillac automobile and the challenge of Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia noted the following:

> The affidavit in support of the warrant discussed the phone conversation in which Mr. Duncan was instructed to go to Savannah to pick up his order, the following of Duncan to Savannah, investigators' observation of various contacts and interactions between Duncan and the Van Nices, and the use of the Cadillac by Mr. Duncan and Delvin Van Nice to go to the private residence. Included also was information that a GBI

> agent had observed a package transferred from the private residence to the Cadillac where it was placed in the vehicle "in such a way as to indicate that it was being concealed." Noted, too, was that suspected marijuana was observed on the car's front seat in plain view as were cigarette rolling papers, "item[s] of paraphernalia utilized in the consumption of controlled substances."

Van Nice v. State, supra. The Court of Appeals found that the affidavit "provided a substantial basis for concluding the auto contained evidence of wrongdoing." *Id.* The court went on to conclude that the fact that the affidavit had recited the G.B.I. agent observed a package being transferred from the residence to the automobile, whereas the later statement by the agent was equivocal as to whether the transfer actually was from the house to the automobile or from the automobile to the house, would not be fatal to the warrant. The court concluded that this was simply a minor factual inaccuracy which would not undermine the probable cause shown. The court did not specifically find that the Van Nices and the Longs both had standing to contest the auto search, but simply assumed that they did. Clearly, should the search be found to be invalid, a further question would be presented as to the standing of all parties involved.

As to the search of the Lincoln automobile in relation to the Duncans, the Court of Appeals of Georgia simply found this allegation to be without merit. The record establishes, as do the affidavits in support of the warrants, that transfers were made between both vehicles in question and the house on Montgomery Crossroads. Once again, Respondent asserts that a simple review of the affidavit

shows that there was sufficient probable cause set forth to justify the issuance of a search warrant.

As noted by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983), a grudging attitude toward search warrants would be inconsistent with the Fourth Amendment principles. "So long as the magistrate had a 'substantial basis for . . . concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.'" *Id.* Clearly, in the instant case the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing based upon the facts presented in the affidavits. Respondent further submits that the police officers in question clearly acted in good faith reliance on the search warrants issued. In such circumstances, there is a strong preference for warrants; thus, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3417 (1984). Of course, this does not preclude inquiry into the knowing or reckless falsity of the affidavit. It has not been shown in the instant case, however, that there was any knowing falsity presented in any of the affidavits or that there was any reckless presentation of false information. Finally, Respondent submits that as required by *Illinois v. Gates, supra*, the affidavit did provide the magistrate with a substantial basis for determining the existence of probable cause.

This Court has recently noted in *United States v. Leon, supra*, that there is no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magi-

strate." *Id.* at 3418. Therefore, "imposition of the exclusionary sanction is not necessarily meaningful to inform judicial officers of their errors, and we cannot conclude admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* Thus, this Court specifically concluded that suppression of evidence obtained pursuant to a warrant "should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 3419.

In the instant case, as the officers presented information in the affidavits which they believed to be true at the time it was given and as any inaccuracies have been shown to be immaterial and as the magistrate had sufficient probable cause presented to him to issue the warrants, any exclusion of evidence in the instant case would simply not further the purposes of the exclusionary rule. Thus, no basis has been shown for the granting of certiorari in regard to this allegation.

VII. THE SEARCH OF PAMELA JEAN LONG WAS JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

Petitioner Long has finally challenged the search of her person and her purse at the time of her arrest. Respondent submits that this was a valid search incident to arrest.

The information known to the law enforcement officers at the time of the arrest was that all persons arrested appeared to be involved in a conspiracy relating to drug trafficking. Agents had monitored phone calls relating to drugs. On March 24, 1983, Lawrence Duncan received a phone call from a person named Raoul stating that he had various items for Duncan which appeared to be codes for drugs. Raoul's vehicle was supposed to arrive in Savannah on Friday morning and he would be at the usual place on Saturday morning. On Friday the Duncans drove to Savannah where they met another vehicle from Dade County on early Saturday morning, this being the vehicle belonging to the Van Nices. On Saturday and Sunday both vehicles engaged in furtive maneuvers. Numerous telephone calls were made and packages were observed moving between the vehicles and a residence on Montgomery Crossroads. The vehicles arrived at the K-Mart parking lot and the occupants appeared to look for surveillance. The arrest was made with the cars together in the lot.

Under Georgia law, conspiracy may be shown by inference and deduction from conduct which shows common design on the part of the persons to act together for the accomplishment of the unlawful purpose. *See Wireman v. State*, 163 Ga. App. 439, 440, 295 S.E.2d 530 (1982). Under the circumstances of the instant case, the officers were justified in concluding that a conspiracy was ongoing and that Petitioner Long was a participant in this conspiracy. Thus, there was probable cause to arrest Petitioner Long and due to the exigent circumstances, there was probable cause to search her person. Therefore, Petitioner Long has shown no Fourth Amendment violation by this allegation.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully prays that the petitions for writs of certiorari filed on behalf of the various Petitioners be denied.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

MARY BETH WESTMORELAND 750150
Assistant Attorney General

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia, 30334
(404) 656-3349